91-59

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ARTHUR L. CHRISTIE, III,

Petitioner,

v.

DEPARTMENT OF NAVY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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38,09.

QUESTION PRESENTED FOR REVIEW

I.

WHETHER OR NOT THE HEARING RECORD IN PETITIONER'S CASE ESTABLISHES EITHER ACTUAL BIAS OR PREJUDGMENT ON THE PART OF THE HEARING EXAMINER THEREBY DEPRIVING PETITIONER DUE PROCESS OF LAW.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Arthur L. Christie, III, and Respondent, Department of Navy, have been parties to this litigation from the beginning.

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OPINIONS BELOW

The opinion of the Merit Systems Protection Board Hearing Examiner in *Christie v. Department of Navy,* Docket Number SF07528810670, was not reported and appears in Appendix A-1. The order of the United States of America Merit Systems Protection Board denying petitioner's petition for review of the above decision by the Hearing Examiner was entered on February 21, 1989, and appears at Appendix A-19. The judgment of the Federal

Circuit Court of Appeals affirming the Merit System Protection Board without opinion was not reported and appears at Appendix A-23.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Federal Circuit was dated and entered on April 8, 1991. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1252 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. U.S. CONST. amend. V.

STATEMENT OF THE CASE

Petitioner was served with a notice of proposed removal on February 18, 1987, which set forth a list of twelve allegations which the Department of Navy maintained constituted continuous insubordination. On May 29, 1987, Petitioner was notified by the Department of Navy that upon consideration of all the facts in the case, including submissions by Petitioner, he was being terminated effective June 2, 1987, from his employment with Navalex.

An appeal to the Merit Systems Protection Board was filed on or about June 24, 1988. A hearing was held before the Hearing Examiner, Lonny Bartholomew, on August 28, 1988. On October 25, 1988, Judge Bartholomew made his Initial Decision wherein he affirmed the agency's dismissal. A timely appeal was taken from the decision to the full Board which on February 21, 1989, dismissed Petitioner's request for review.

An appeal was taken to the United States Court of Appeals for the Federal Circuit pursuant to 5 USC 7703 (b)(1). On April 8, 1991, the Federal Circuit after oral argument affirmed without opinion the decision of the Merit Systems Protection Board.

REASONS FOR GRANTING THE WRIT

THE FEDERAL CIRCUIT COURT OF APPEALS HAD DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER THAT IS VIOLATIVE OF DUE PROCESS.

A. Hearing Record.

At the outset of the hearing before the Merit Systems Protection Board, the Administrative Judge had an off-the-record conversation with the parties and their attorneys. In the discussion, the Administrative Judge chastised and ridiculed Petitioner and indicated that he should settle the case since it was unlikely that he could prevail at the hearing. He indicated further that Petitioner had abused the hearing process and queried as to "who Petitioner felt that he was" in thinking that he could abuse the process and prevail.

The trial transcript, hereinafter referred to as TT, at 1 indicates this off-the-record conversation. This off-the-record conversation reflected the Administrative Judge's bias and prejudice exhibited during the August 12, 1988, prehearing conference, where Petitioner and counsel were chastised and ridiculed.

The Judge notes that "I was very emphatic when I said that Appellant could not insulate himself from discipline by filing various complaints." TT 4. He indicated further than Appellant's witnesses had nothing of relevance to offer the hearing before any of them even testified. TT 4.

During the middle of the testimony of Elray Adkins, the agency's primary witness, the Administrative Judge

inappropriately launched into a diatribe about the sincerity of Adkins' testimony and that Petitioner "sits here and would have everyone believe that he's never caused a problem in his life." Christie had not even testified. TT 51-52.

During the cross examination of Adkins, the Administrative Judge indicated, even before Christie testified, that "Appellant has stressed avoidance of confronting the actual accusation throughout the whole processing of this case." TT 58. Prior to that, the Judge commented, again before Christie had even testified that "Appellant starts popping off and tells him to go talk to his lawyer and of all this other stuff." TT 57.

At TT 67, the Administrative Judge commented "who is Mr. Christie? Does he run this Agency or what?"

At TT 70, the Judge goes on in his diatribe. "The Appellant sits here and looks wide eyed like, 'Oh my God, I don't understand this.' Adkins provided very specific testimony. This guy has testified at some length about all the things he had tried to do to work with the Appellant. The Appellant so far hasn't done anything except say, 'I didn't do any of this stuff. Everybody else is wrong.' The Appellant is pristine in this case. Go ahead." Appellant had not even testified.

At TT 78, he said "these wild notions, these wild accusations are so bizarre that Appellant has made, there is no evidence of that until after the Appellant lost his job."

At TT 79, the Administrative Judge indicated that Appellant was abusing the process. In actuality he was

not doing anything, his counsel was merely cross examining.

At TT 83, the Judge said your client "has made all kinds of wild accusations in this case. I don't think it gives it a whole lot of credibility for you to say that your client said this and your client said that. Your client has said all kinds of things that I specifically rejected before we got to this hearing today."

At TT 90, when counsel was going to respond, after counsel got the word "well" out, the Judge sarcastically interrupted after breaking in and would not allow counsel to finish. *See also* TT 90-93.

At TT 104, the Court indicated "The Appellant can't come in here, as he's done with these other charges, with some defense like, 'instead of all this, really this is some simple thing. I just don't know what I was doing.' That's not the charge. That is not an excuse or what the charge is here." TT 104.

At TT 105, the Court indicated "When are we going to get to the meticulous testimony that he's providing about the Appellant's attitude and apparently what Appellant did? Without quibbling about this could have been a mistake. It could have been a mistake, but let's not ignore everything that's in the record. We're not sitting here like we stepped off a 727 and said 'hey this is an interesting case.' "

At TT 110, the Court said "Who is this guy? His boss goes up to him and asks him something and he says talk to my attorney or put it in writing. Who does he think he is?"

At TT 114 the Court indicated that the Appellant has "got his head in the clouds somewhere."

At TT 175, the agency asked to present a witness by affidavit. The Court responded by saying "I think that his testimony is probably going to be identical to the final decision of the issue," indicating that the Court's mind had already been made up even prior to hearing the Appellant's testimony and evidence.

At TT 183, "The Appellant thinks he's going to get up there and say, 'All those people are dead wrong. I'm the one who's right. I'm innocent. I don't do anything. I'm never abusive.' The Appellant is dreaming."

At TT 242, the court indicated in referring to Appellant, that "everyone would be jumping with joy if you could get rid of that employee."

Most all the comments indicating the Court's lack of neutrality, objectivity, and fairness were made even before Appellant had even testified. The Court's demeanor and neutrality fell far below the standard expected of administrative law judges. Appellant had the right to present his case without the ridicule and personal attacks made by the Court upon him even prior to the time that he presented any witnesses.

B. Under Applicable Law The Hearing Examiner Was Biased And Had Prejudged The Case.

The Administrative Law Judge was biased and prejudiced toward Petitioner making it impossible for Petitioner to receive a fair determination of his claims. *Matter of Chocollo,* L MSPR 605, 2 MSPB 20 (1980); *Acting Special*

Counsel v. Sullivan, 4 MSPR 485 (1981); 5 CFR 1201.42 (a). Although administrative law judges are entitled to a presumption of honesty and integrity in the performance of their adjudicative duties, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), the test for disqualification in adjudicatory proceedings is whether an agency adjudicator has in some measure adjudged the facts of a particular case in advance of hearing it. *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970). The facts of this case establish the bias of the Administrative Law Judge in this case and the fact that he had prejudged the case even before Petitioner had testified. The bias in this case deprived Petitioner of his due process right to have his case heard by an impartial judge. The Court of Appeals for the Federal Circuit refused to reverse the decision of the full Merit Systems Protection Board further denying Petitioner of his right to an impartial decider of the facts.

CONCLUSION

This case, on its facts, presents an important question under the due process clause as to the extent of partiality that an administrative law judge must exhibit in determining a particular case. In the present case, Petitioner asserts that the record shows conclusively that the Hearing Officer was biased and had prejudged the case prior to even hearing testimony. Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

ARTHUR L. CHRISTIE, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER SF07528810670 DATE: October 25, 1988

Terry L. Pechota, Esquire, Finch, Viken, Viken and Pechota, Rapid City, South Dakota, for the appellant.

Kathleen A. O'Neill, Esquire, Washington, D.C., for the agency.

BEFORE

Lonny A. Bartholomew
Administrative Judge

INITIAL DECISION

INTRODUCTION

Appellant timely appealed an agency decision which removed him from the position of Equipment Specialist.[1]

[1] Appellant was removed effective June 2, 1987, and he initially appealed to the Board on June 16, 1987. The appeal was dismissed on two occasions (September 16, 1987, and January 27, 1988) at the request of the parties. The dismissals were based on litigation pending in Federal District Court which involved similar and/or identical issues.

The Board has jurisdiction pursuant to 5 U.S.C. § 7511, 7512, and 7701(a).

For the reasons set forth below, the agency's removal decision is AFFIRMED.

ANALYSIS AND FINDINGS

The Charges

Appellant was removed from the agency on a sustained charge of *"Continuous Insubordination."* Appeal File, Agency File, Ex. 4 (Notice of Proposed Removal). Appellant was advised in that notice that the substance of the charges involved a pattern of misbehavior which was intolerable. Specifically, appellant's supervisor explained the charge, as follows:

> You continually ignore my instructions, disrupt the work in the division, and undermine my authority as your supervisor. Additionally, every discussion with you concerning your improper attitude and/or behavior turns into a confrontation.

Id. at 1. The charge set forth twelve specific examples of unacceptable and disruptive behavior which allegedly occurred in an 11-week period from October 1, 1986, through December 16, 1986.

As will be set forth, I find that the agency has supported the charge of continuous insubordination by preponderant evidence; that is, I find that the agency has established that appellant continually ignored his supervisor's instructions, disrupted work in the division, and undermined his supervisor's authority.

Specific instances of continuous insubordination

The first specification of disruptive behavior identified by the agency concerns comments made by appellant to a coworker, Mr. C. Almirol. While returning with appellant from an on-duty trip, Almirol reported that appellant stated that if things didn't go right for him, all he (appellant) needed was "his gun, his lawyer and some paperwork." Almirol considered the comments to be a serious threat and he reported them to Mr. E. Adkins, appellant's supervisor. Adkins has indicated for the record that when he attempted to discuss this matter with appellant, appellant became very defensive and argumentative. *See* Hearing Testimony, Almirol and Adkins; Appeal File, Agency File, Exs. 3-3.1 (Memorandum, Adkins) and 3-7 (Sworn Declaration, Almirol).

Appellant's response to this charge, as well as to a number of other charges discussed below, is, basically, a denial of offensive conduct. Appellant does not deny that he made the statements; nor does he contest the fact that Almirol regarded the matter sufficiently serious so as to warrant mentioning it to his supervisor. I find the detailed statements and the consistent testimonies of the two agency witnesses to be more credible than appellant's simple denial.

The second specification cited by the agency concerns a refusal by appellant to accept work from a clerk in the performance of her duties, and the consequent necessity for appellant's supervisor to order the appellant to perform the properly assigned duty. As evidence to support this charge, the agency provided statements and testimony from both the clerk involved and appellant's

supervisor. Clerk L. Gregorio testified that on October 20, in the course of her duties of routing work documents among appellant and his co-workers, she approached appellant, who refused to accept his share of the workload. In his testimony and in a statement for the record, Adkins indicated that Gregorio advised him of the problem and that he had to order appellant to accept work as distributed. *See* Hearing Testimony, L. Gregorio, E. Adkins; Appeal File, Agency File, Exs. 3-4 (Sworn Declaration, Adkins) and 3-8 (Sworn Declaration, Gregorio).

Appellant does not deny the occurrence of the incident. He contends, however, that his conduct was not offensive. Again, I find the statements and the testimonies of the two agency witnesses to be more credible than appellant's simple denial. I find appellant's conduct to be an example of continuous insubordination.

The agency's third specification also involves Gregorio. Appellant is here accused of shouting at Gregorio in a hostile and offensive manner. Among other things, appellant allegedly shouted at Gregorio that he was a GS-9 and that she was not to talk to him. Gregorio, who appeared to be a very timid person at the hearing, testified that appellant was yelling at her and ordered her out of his presence. Mr. Wade Crawford, Warehouse Worker Foreman, observed and heard appellant's outburst. Crawford was appellant's acting supervisor at the time and called appellant in to ask him what the problem was. Appellant refused to talk to acting supervisor Crawford and defiantly stormed out of the office. See Hearing Testimony, Gregorio; Appeal File, Agency File, Exs. 3-2 (Sworn Declaration, Crawford), and 3-8 (Sworn Declaration, Gregorio).

In response to this charge, appellant, again, does not deny the occurrence of the incident. Appellant's response is that he did not consider his conduct offensive. I find the consistent, credible evidence provided by the two agency witnesses to be more persuasive than appellant's simple denial.

The agency's fourth specification concerns an accusation that appellant repeatedly refused to report temporary absences to acting supervisor Crawford. Appellant had been directed to report to the acting supervisor whenever he left his work site. On October 22 and 23, appellant left his work site without reporting to Crawford. When confronted, appellant sarcastically demanded that the instruction be placed in writing. See Hearing Testimony, Adkins; Appeal File, Agency File, Exs. 3-2 (Sworn Declaration, Crawford), 3-4 (Sworn Declaration, Adkins).

Appellant's response to this charge, provided in testimony at the hearing, was that on both days he looked for Crawford but couldn't find him. Even if appellant's assertion were true, and there is no evidence to support such a finding, appellant was still insubordinate for leaving his work site. Further, appellant did not deny the sarcastic comment concerning "put it in writing." The affidavits and testimony provided by the agency's witnesses are more persuasive than appellant's explanation.

The fifth specification concerns rude behavior by appellant in answering a telephone call on October 23, 1986. Ms. F. Centeno called appellant's work site and asked to speak to the Shop Stores Lead Warehouseman. Centeno has indicated that appellant answered the phone

and that he was very rude, discourteous and refused to take a message. The incident was reported by Centeno to Adkins. See Hearing Testimony, Centeno and Adkins; Appeal File, Agency File, Exs. 3-3.4 (Sworn Declaration, Adkins), 3-6 (Sworn Declaration, Centeno).

Appellant's response to this charge is that he did not feel his conduct was rude or discourteous. Again, I find appellant's simple denial to be less persuasive than the statements and testimonies provided by the agency. The charge is supported by preponderant evidence.

Specification number six involves a charge by the agency that appellant repeatedly refused to follow orders from his supervisor, and that he would repeatedly argue with his supervisor and/or make such comments as, "so I made a mistake." Adkins provided extensive testimony at the hearing regarding this example, and he has also provided elaborate notes for the record of his confrontations with appellant. It is apparent from review of the cited evidence, that appellant was continuously disruptive and insubordinate. When appellant was given direction, he immediately created a confrontation. See Hearing Testimony, Adkins; Appeal File, Agency File, Exs. 3-1.1,4 and 3-2 (Sworn Declarations, Adkins).

In response to this charge, and the statements and hearing testimony, appellant testified that he was doing his job, and that he always remained calm. He testified, further, that he made the errors charged but that he did not make any offensive or insubordinate comments. Again, the record is replete with meticulously documented incidents regarding appellant's insubordinate behavior, and I find his simple denial to be not credible.

In specification seven, appellant is charged with making sarcastic, insubordinate comments regarding his failure to sign out on a required seriatim muster sheet. Appellant provided that following annotations on the muster sheet regarding repeated failures to sign out, on November 7, "I was thinking about my girlfriend," on November 14, "T.G.I.F.," on November 20, Personal business," and, finally, he told his supervisor on November 20, that his reason for not signing out was his personal business.

Appellant's response to this charge is that he does not feel his comments were sarcastic or inappropriate to the workplace, or that he was insubordinate when he remarked to his supervisor, in response to an inquiry regarding his failure to sign the muster sheet, that it was his (appellant's) personal business. I find appellant's sarcastic comments on the agency's business record to be an example, as charged, of continuous insubordination.

With regard to the eighth specification, appellant is charged with repeatedly ignoring orders by his supervisor that he not xerox the muster sheet. On November 21, appellant's supervisor observed appellant trying to xerox the sheet and confronted him, again telling him not to xerox the sheet. Appellant began to shout and argue with Adkins. *See* Hearing Testimony, Adkins; Appeal File, Agency File, Ex. 3-3.2 (Memorandum, Adkins).

Appellant's response to this example is a simple denial. Although appellant acknowledges that he was told, as indicated by Adkins, not to copy the muster sheet, he contends that he was very calm, and that he merely agreed not to copy it. As will be set forth more

elaborately, infra, I find appellant's simple denial to be not credible.

In the ninth specification, appellant is charged with repeatedly leaving his work site without his supervisor's permission and with becoming confrontational and disrespectful when told not to leave the work site. In a lengthy paragraph on page three of the proposal to remove notice, appellant's supervisor sets forth an elaborate explanation concerning appellant's insubordination. Basically, appellant was of the opinion that he could leave his work site whenever he chose to go to a public telephone to "call his lawyer" or pursue other personal business. Five such incidents are set forth in the notice. In his testimony at the hearing, Adkins stated that appellant "had a pure disregard for me as a supervisor." He noted that appellant was abusive in his comments and repeatedly challenged him to "put it in writing." See Hearing Testimony, Adkins; Appeal File, Agency File, Ex. 3-3.2 (Memorandum, Adkins).

In response to this charge, appellant conceded that at least on one occasion (November 26), he had been confronted by his supervisor regarding his use of a public telephone during duty hours. Appellant claimed, however, that the balance of the specifics were "lies" by his supervisor. Again, I find no merit to appellant's unsupported denial, as opposed to the elaborate explanation and documentation provided by the agency.

The tenth specification concerns repeated references by appellant to female employees in the office as "girls." Appellant was specifically ordered not to refer to female employees as girls. When admonished regarding this

unacceptable conduct, appellant argued with his supervisor and challenged his supervisor with a dictionary, arguing that a female is a girl. When supervisor Adkins explained to appellant that the female employees were offended by appellant's references to the "girls" and/or being referred to as "that girl," appellant disrespectfully demanded that the direction be "put in writing." One of the female employees described her displeasure for the record regarding appellant's offensiveness. See Hearing Testimony, Brown, Adkins; Appeal File, Agency File, Exs. 3-3.2 (Memorandum, Adkins), 3-5 (Sworn Declaration, Brown).

In response to the above, appellant admitted in his testimony that he did bring out a dictionary in his discussion with his supervisor regarding this matter. He testified, further, however, that both Adkins and Brown were lying about his use of the word girl. Again, appellant merely asserts that his behavior was acceptable and that his accusers have fabricated their statements. The preponderance of the evidence supports the agency's charge.

The eleventh specification is uncontested by appellant. In this example, appellant is charged with refusing to respect the authority of acting supervisor Crawford. Appellant admitted in his testimony at the hearing that he did refuse to meet with supervisor Crawford. This charge is sustained.

The twelfth specification is similar to number nine and involves appellant's repeated refusal to acknowledge the authority of his supervisor. On December 16, appellant approached his supervisor and indicated that he was going to a public telephone booth to call his attorney.

Adkins was on the phone at the time and told appellant to wait. Appellant did not wait and, ignoring his supervisor's direction, he left to use the phone without permission from Adkins. See Hearing Testimony, Adkins; Appeal File, Agency File, Ex. 3-3.3 (Memorandum, Adkins).

Appellant's response to this charge is that Adkins is lying. Appellant admitted however, that he did make the call as described. I find Adkins' elaborate discussion of this matter, and the accompanying memorandum for the record, to be more persuasive than appellant's denial.

In review, the agency's case is based, in large measure, on the testimony of supervisor Adkins. Significantly, he was an extremely credible witness at the hearing. It was clear from his demeanor that appellant was a source of considerable stress and frustration. At the end of his several hours of examination, Mr. Adkins noted that, like appellant, he was a disabled veteran. He expressed pride in his career of government service, progressing in the military from the rank of E1 to Master Sergeant, and obtaining a supervisory position in the federal civilian service. He testified with some distress that he honestly felt that both he and the Command had done everything they possibly could to try to work with appellant. He was not happy that his and the agency's efforts failed. It was readily apparent that appellant's obstinate insubordination was a cause of extreme distress for Mr. Adkins. I found his testimony to be entirely candid, specific, and believable. *See generally Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-62 (1987).

In contrast, I found appellant to be not credible. Appellant's testimony was often evasive and he, frequently, admitted the specifics of the charges up to, but excluding, culpability. Appellant also argues that he alone was telling the truth, that Adkins, Brown, Centeno, and Gregorio, all lied about his allegedly offensive behavior. I find it implausible to accept appellant's simple, unspecific denials and ignore the abundant evidence provided by the agency.

The preponderancy of the evidence of record supports the agency's charge of continuous insubordination.

Affirmative defenses

Appellant, through two different representatives, has submitted copious amounts of paper in conjunction with his appeal. The vast majority of this documentation is repetitious. Further, little of the submitted information is relevant to a Board proceeding. As pointed out in several prehearing conferences which were summarized on the record at the hearing, although literally hundreds of pages of documents were submitted by appellant regarding his appeal, little or no reference was made to Board precedent until appellant was ordered to do so prior to the scheduled hearing.[2] Appellant's affirmative defenses reflect this significant shortcoming.

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[2] Appellant was similarly chastised in the United States District Court for the Southern District of California. The Honorable Judith Keep stated, with regard to appellant's claims, "Plaintiff has haphazardly asserted his allegations and done so with at times blatant disregard for this Court's ruling. . . . Civil Case No. 87-0482-K (IG), Transcript of Motions Hearing, at 14 (May 16, 1988).

Appellant has asserted, on appeal, that the agency action is a product of discrimination against him on the basis of a physical handicap and/or that the action was a reprisal for prior filings of EEO complaints. As will be set forth, I find both of these claims to be without merit.

With regard to appellant's claim of handicap discrimination, the Board had held that such allegations are part of the general corpus of discrimination law and that the criteria for establishing a prima facie case of handicap discrimination will vary according to the factual situation presented and the nature of the agency's action. *See Stalkfleet v. United States Postal Service*, 6 M.S.P.R. 637, 647 (1981). In every case, the employee must establish that he is a qualified handicapped employee and he must articulate a reasonable accommodation. Finally, the employee must establish a connection between the adverse action and the alleged violation by the agency of its duty to accommodate his handicap. *See Siedle v. Department of the Interior*, 35 N.S.P.R. 241, 252 (1987). Appellant made no effort to satisfy the legal requirements for this defense. Appellant made no effort to connect the current charges to any handicap discrimination claim and there was no articulation of any accommodation. *See* Appellant's Closing Argument, at 32. I find the claim to be frivolous.

Appellant has also alleged that the agency is guilty of a prohibited personnel practice. Specifically, appellant claimed that he was removed in reprisal for his filing of some eleven EEO complaints during his tenure with the agency. In order to prevail with such a claim, an

employee must demonstrate that he engaged in an activity protected by statute, that was subsequently subjected to an adverse action by the agency, that the proposing and deciding officials had actual or constructive knowledge that the employee was engaged in protected activity, and that there is a causal connection between the protected activity and the adverse action. *See Bodinus v. Department of the Treasury*, 7 M.S.P.R. 536, 541 (1981), *aff'd* 785 F.2d 323 (Fed. Cir. 1985). As part of his burden of proving a causal connection between the protected activity and the adverse action, the employee must also prove that the retaliatory motive was a significant or substantial factor in the taking of the adverse action. *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 272 (1981).

In this case, appellant has palpably failed to establish a causal connection between the protected activity and the adverse action. As previously noted, the agency's key witness regarding the current charges was supervisor Adkins. Supervisor Adkins was an entirely credible witness. Further, during literally hours of testimony, there was not even a hint that retaliation was a factor in his actions. On the contrary, it was readily apparent that Adkins was painfully patient with appellant's obstinate defiance. I find that appellant has failed to demonstrate that reprisal and/or animosity was in any way causally related to the filing of prior EEO complaints and/or animosity.

The penalty

In his final decision, the agency's deciding official carefully set forth his analysis of the penalty. This analysis comports with the requirements set out by the Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). It is apparent that the deciding official carefully considered the nature and seriousness of the charge, appellant's employment record, appellant's potential for rehabilitation, his dependability, and alternative sanctions. It is also apparent from the elaborate testimony of Mr. Adkins that the agency was left with no choice of penalty. Appellant's insubordination was intolerable.

The Board has held that insubordinate, disruptive, and disrespectful behavior are not acceptable conduct and are not conducive to a stable working environment. *Fonville v. Department of Health and Human Services*, 30 M.S.P.R. 351, 354 (1986). Insolent disrespect toward supervisors so seriously undermines the capacity of management to maintain employee discipline that no agency should be expected to exercise forbearance for such conduct more than once. To expect management to tolerate appellant's repeated insolent behavior would make a mockery of management's authority and supervisory responsibility; few other types of misconduct go so directly so the heart of maintaining the efficiency of the service. *Jefferson v. Veterans Administration*, 6 M.S.P.R. 348, 352 (1981).

In the instant case, appellant's repeated obstinate insubordination is clearly within the description set forth in *Jefferson*. I find that the agency properly considered the

Douglas factors and that the penalty of removal is within the bounds of reasonableness.

In review, I find that the agency has supported the charge by preponderant evidence, and that appellant's removal is for such cause as will promote the efficiency of the service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Lonny A. Bartholomew
Lonny A. Bartholomew
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on November 29, 1988, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Review and Appeals
Equal Employment Opportunity Commission
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination

and nondiscrimination issues by filing a petition with the appropriate United States District Court no later than 30 calendar days after the date this initial decision becomes final.

If you choose *not* to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be *received* by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Arthur L. Christie
1220 Rosecrans Street, Suite 146
San Diego, CA 92106

Appellant's Representative

Terry L. Pechota, Esquire
Finch, Viken and Pechota
304 Main, P.O. Box 2934
Rapid City, SD 57709

Agency Representative

Kathleen O'Neill
Department of the Navy
Space & Naval Warfare Systems Command
Office of Counsel, Code 00C
Washington, DC 20363-5100

Other

Timothy M. Dirks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, NW., Room 7623
Washington, DC 20415

Date: October 25, 1988 /s/ Diane S. Freund
Diane S. Freund
Legal Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ARTHUR L. CHRISTIE, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER SF07528810670 DATE: FEB 21 1989

Terry L. Pechota, Esquire, Finch, Viken, Viken and Pechota, Rapid City, South Dakota, for the appellant.

Kathleen A. O'Neill, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on October 25, 1988, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims, *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, VA 22041

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by

a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Terry L. Pechota, Esq.
Finch, Viken, Viken and Pechota
304 Main, P.O. Box 2934
Rapid City, SD 57709

Arthur L. Christie
1220 Rosecrans Street, Suite 146
San Diego, CA 92106

By regular mail to:

Kathleen A. O'Neill
Assistant Counsel
Department of the Navy
Space and Naval Warfare Systems Command
Washington, DC 20363-5100

Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7623
Washington, DC 20415

Merit Systems Protection Board
San Francisco Regional Office
525 Market Street, Suite 2800
San Francisco, CA 94105-2789

By hand to:

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, DC 20419

FEB 21 1989
(Date)

/s/ Illegible
Robert E. Taylor
Clerk of the Board

Washington, D.C.

MAY 2 1991

Note: Pursuant to Fed. Cir. R. 47/8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

90-3520

ARTHUR L. CHRISTIE, III,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL
CIRCUIT

APR 8 1991

FRANCIS X. GINDHART
CLERK

Judgment

ON APPEAL from the Merit Systems Protection Board ***in CASE NO(S).*** SF07528810670

This CAUSE having been considered, it is

ORDERED and ADJUDGED: AFFIRMED. *See* Fed. Cir. R. 36

Per Curiam (NEWMAN, *Circuit Judge*, MILLER, *Senior Circuit Judge*, and PLAGER, *Circuit Judge*).

ENTERED BY ORDER OF THE COURT

DATED APR-8 1991

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: April 29, 1991

(2)

No. 91-59

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

ARTHUR L. CHRISTIE, III, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
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QUESTION PRESENTED

Whether the administrative judge was biased against petitioner and prejudged petitioner's challenge to the decision removing him from federal service, resulting in a denial of due process.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A23) is unpublished, but the judgment is reported at 932 F.2d 980) (Table). The final decision of the Merit Systems Protection Board (Pet. App. A19-A22) is also unreported, as is the opinion of the administrative judge (Pet. App. A1-A18).

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1991. The petition for a writ of certiorari was filed on July 8, 1991. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

The Navy removed petitioner from his position as a civilian equipment specialist primarily on account of his insubordination. The evidence supporting petitioner's removal, which is described in the opinion of the administrative judge sustaining the removal, Pet. App. A1-A18, showed that: (1) petitioner had threatened a coworker; (2) petitioner refused to accept work assignments transmitted by his supervisor through a clerk; (3) petitioner told the clerk that "he was a GS-9 and that she was not to talk to him," *id.* at A4; (4) petitioner repeatedly refused to report temporary absences to his supervisor; (5) petitioner was rude to persons who called on the telephone; (6) petitioner repeatedly refused to follow his supervisor's instructions; (7) petitioner made sarcastic, insubordinate comments regarding his failure to sign out when leaving work; (8) petitioner ignored orders not to copy attendance records; (9) petitioner repeatedly left work during working hours without permission; (10) petitioner persisted in referring to certain coworkers as "girls," despite their objections; (11) petitioner refused to meet with an acting supervisor on one occasion; and (12) petitioner refused to follow a direct instruction from his supervisor to wait until the supervisor got off the telephone before leaving the work site.

Petitioner challenged the decision of the administrative judge by attacking the judge's integrity. Both the Merit Systems Protection Board (MSPB) (Pet. App. A19-A22) and the Federal Circuit (*id.* at A23) upheld the decision of the administrative judge in summary fashion.

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

As petitioner acknowledges (Pet. 8), administrative judges are entitled to a presumption of honesty and integrity in the performance of their adjudicative duties. *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). Petitioner does not allege that the administrative judge had a pecuniary interest in the outcome of this case, that the judge had been the target of personal abuse from petitioner, or that the judge had a role in investigating or prosecuting petitioner, situations where the probability of actual bias is high. *Ibid.* Indeed, petitioner makes no claim at all of bias from any extrajudicial source.

Instead, petitioner just alleges that the administrative judge's statements with respect to petitioner's case show that the judge was biased. More particularly, relying on *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970), petitioner claims that the administrative judge "had prejudged the case." Pet. 8. That is not so. In his petition, petitioner refers to a number of harsh comments the administrative judge made during the course of the proceedings. The MSPB and the Federal Circuit correctly concluded that those comments did not show prejudgment; taken in context, they merely show that the administrative judge was not impressed by petitioner's submissions at any stage of the proceedings.

For instance, petitioner first complains (Pet. 4) that during an off-the-record conversation the judge advised petitioner and his attorney to settle their

case. Petitioner neglects to mention that, at the time of that conversation, the administrative judge had been overseeing the case for nearly a year and was well-versed with respect to petitioner's arguments and his evidence. C.A. App. 292-299, 325-327. Thus, the judge's comments did not show prejudgment—as might a statement that plaintiffs challenging adverse personnel actions always lie or that federal supervisors are consistently truthful—but instead reflects the judge's preliminary assessment of the strength of the evidence in this case. Petitioner offers no support for his apparent contention that a preliminary appraisal of the merits of a case by a judge constitutes a denial of due process, a contention that would undermine the common practices of many courts.[1]

Among the many other comments about which petitioner complains, one appears on its face to show objectionable prejudgment—the administrative judge's statement (Tr. 175; see Pet. 7), with respect to testimony of the Navy employee who had made the final removal decision, that "I think his testimony is probably going to be identical to the final decision of

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[1] Comments designed to foster settlement are quite different in nature from the statements the D.C. Circuit found objectionable in *Cinderella Career & Finishing Schools*. In that case, the Chairman of the Federal Trade Commission had made a public speech that made his position clear with respect to a case pending before the Commission. The court of appeals found that "[c]onduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." 425 F.2d at 590. In this case, of course, none of the administrative judge's comments about which petitioner complains were made in public speeches.

the issue." In context, however, it is clear that the judge was *not* referring to the decision *he* was going to render in this case, but was instead referring to the final decision the Navy employee had rendered removing petitioner from his employment; that is, all the judge was saying was that it appeared that the employee's testimony would not vary from the employee's written statements. The judge made the comment after the government's counsel had asked for permission to submit an affidavit in lieu of testimony from that employee. The judge said that "I think his testimony is going to be identical to the final decision in this case," and the government's counsel responded, "Yes, it will be. That's all I was going to put him on for," which prompted the judge to say "I don't know if he could add anything." Tr. 175-176. Thus, in context, the comment at issue did not show that the administrative judge had made up his mind, but only that the judge was willing to rely on the affidavit and decision of the Navy employee and did not think that the employee's oral testimony was required.

The other comments about which petitioner complains, considered in context, show only the administrative judge's assessment of the strength of petitioner's case at various points, and do not show that the judge was biased against petitioner or that he had prejudged the case. In any event, there is no need for this Court to reconsider petitioner's fact-bound claims of bias and prejudgment, which were rejected by the MSPB and the Federal Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
ARNOLD M. AUERHAN
Attorneys

NOVEMBER 1991

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